Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

October Term, 2001

RICHARD D. DONOHOO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

Richard D. Donohoo,
Cheryl C. Godbout-Bandal, and
Bruce A. Rasmussen,

Defendants.

Civ. No. 98-2387/RHK/JMM[1]

MEMORANDUM OPINION AND ORDER

Mary Trippler, Assistant United States Attorney, Minneapolis, Minnesota, for Plaintiff.

Richard D. Donohoo, pro se, Minneapolis, Minnesota, for Defendant Donohoo.

Cheryl C. Godbout-Bandal, pro se, North Oaks, Minnesota, for Defendant Gobout-Bandal.

Philip W. Getts, Law Offices of Philip W. Getts, Minneapolis, Minnesota, for Defendant Rasmussen.

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[1] A second case had initially been filed, 98-2388/RHK/RLE, naming only Donohoo as a Defendant. On February 9, 1999, Magistrate Judge Mason consolidated the two cases, thereby closing 98-2388/RHK/RLE and merging the contents of that case with the instant case.

Introduction

Plaintiff United States of America ("the Government") has brought the instant action to enforce civil monetary penalties assessed by the FDIC against the Defendants. The FDIC determined that the Defendants, along with others, had violated the Change in Bank Control Act of 1978 (CBCA), 12 U.S.C. § 1817(j), and other statutes and regulations by acting in concert to obtain control of the Capital Bank in 1988 and 1989. See Lindquist & Vennum v. FDIC, 103 F.3d 1409, 1412-15 (8th Cir.), cert. denied, 118 S. Ct. 77 (1997). Consequently, the FDIC imposed civil monetary sanctions on each of the Defendants, who then appealed the FDIC's order to the Eighth Circuit Court of Appeals. See id. The Eighth Circuit heard the Defendants' appeal of the FDIC's order on October 21, 1996, and affirmed that part of the FDIC's order relating to the Defendants on January 8, 1997. A detailed description of the underlying facts is set forth in the Eighth Circuit's opinion. See id. In its opinion, the Eighth Circuit specifically considered the appropriateness of the monetary sanctions, noting that the FDIC had adopted penalties that required the Defendants to pay not only the amounts that they had received from the illegal takeover of Capital Bank but also an additional penalty. See id. at 1418. The court held that

such penalties were "substantially supported by evidence on the record as a whole and based on proper interpretations of the relevant statutory provisions." Id. at 1418-19.

The FDIC sent demand letters to the Defendants on March 12, 1997, and again on May 29, 1997, noting that the Eighth Circuit had affirmed the FDIC's order and demanding that each of the Defendants pay the penalties in their entirety. (See Genova Aff. ¶ 11 & Ex. E (demand letters).) The Defendants allege that they have "in effect" satisfied some portion of their debt, although this contention is limited to their argument that their payment of a judgment against them in a related litigation, Wenzel v. Mathies, 542 N.W.2d 634 (Minn. Ct. App. 1996), should be construed to satisfy the penalties imposed upon them by the FDIC. (See Rasmussen's Opp'n Mem. at 1-2, 4-5 ("Because Mr. Rasmussen made only one such profit, he should not be twice required to re-pay this sum and thus suffer a double penalty.").) The Defendants appealed the ruling against them in Wenzel, and the Minnesota Court of Appeals affirmed the lower court on January 16, 1996. Wenzel, 542 N.W.2d at 634. Currently before the Court is the

Government's Motion for Summary Judgment. For the reasons set forth below, the Court will grant the Motion.[2]

Analysis

A. Standard of Review

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment has the burden of identifying the evidence that it believes demonstrates the absence of a genuine issue of material fact. See Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). On a motion for summary judgment, the court does not weigh facts or evaluate the credibility of the evidence, but instead

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[2] The Government has moved for summary judgment against Defendants Donohoo, Godbout-Bandal, and Rasmussen. On May 17, 1999, Donohoo filed a Suggestion of Bankruptcy, which the Government concedes has the effect of staying the instant proceeding against him. Because the instant action against Donohoo is stayed, the Court's Memorandum Opinion and Order does not apply to him. The Court has included references to Donohoo's responsive memorandum, however, because prior to his filing of the Suggestion of Bankruptcy, Godbout-Bandal submitted a document to the Court in which she adopted the arguments set forth in the memoranda of both Rasmussen and Donohoo.

views all evidence and the inferences that may be reasonably drawn therefrom in the light most favorable to the nonmoving party. See Enterprise Bank, 92 F.3d at 747. The nonmoving party may not rest on mere allegations or denials, however, but must demonstrate on the record the existence of specific facts that create a genuine issue for trial. See Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict in favor of the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 256, 106 S. Ct. 2505, 2514 (1986).

B. This Court's Power to Review the FDIC Order

This Court has power to enforce the FDIC's order pursuant to 12 U.S.C. § 1818(i)(1), which provides as follows:

> The appropriate Federal banking agency may in its discretion apply to the United States district court...within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831o or 1831p-1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise

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(See March 26, 1999 letter from Godbout-Bandal to Trippler (attached to Rasmussen Aff.).)

> provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i)(1). Section 1818 goes on to provide that, if any person fails to pay a penalty assessed under the jurisdiction and enforcement paragraph of the statute, "the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court." Id. § 1818(i)(2)(I)(i). Finally, the statute states: "In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review." Id. § 1818(i)(2)(I)(ii). "Thus, the very same statute that vests this Court with jurisdiction to adjudicate this enforcement action precludes it from examining the merits of [the Defendants'] challenges to the [FDIC]'s ability to issue the ...Order." Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1470 (S.D. Fla. 1997).

Courts have interpreted and applied this "preclusion clause" of § 1818(i) according to its literal terms, as not allowing a district court to review the decisions of an agency proceeding under the statute. See Paul, 985 F. Supp. at 1471 (collecting cases); see also United States v. McKinney, 983

F.2d 1079 (unpublished table decision), 1992 WL 375194 (9th Cir. 1992); Leuthe v. Office of Fin. Inst. Adjudication, 977 F. Supp. 357, 361 (E.D. Pa. 1997), aff'd, 162 F.3d 1151 (3d Cir. 1998). In Groos National Bank v. Comptroller of Currency, 573 F.2d 889 (5th Cir. 1978), the Fifth Circuit discussed the rationale behind § 1818(i)'s preclusion clause:

> Section 1818 as a whole provides a detailed framework for regulatory enforcement and for orderly review of the various stages of enforcement; and section 1818(i) in particular evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no "clear departure from statutory authority."

Groos, 573 F.2d at 895 (citing Manges v. Camp, 474 F.2d 97 (5th Cir. 1973)).

In the instant case, the Defendants do not argue that there has been a "clear departure from statutory authority," and the Court finds that such an argument would be untenable in light of the fact that the Eighth Circuit has already reviewed and affirmed the FDIC's order. Instead, they argue that, because each of them has satisfied the judgment in Wenzel, the related state court case, it would be unfair to force them to again suffer a penalty for their misconduct. (See Donohoo Opp'n Mem. at 4-5; Rasmussen Opp'n Mem. at 4-5.) In addition, Donohoo argues that the

FDIC order is barred by the applicable statute of limitations, and that the imposition of the penalty by the FDIC violates his rights to a jury trial under the Seventh Amendment, to a speedy and public trial under the Sixth Amendment, and to be free from excessive fines and cruel and unusual punishment under the Eighth Amendment. (See Donohoo Opp'n Mem. at 5-8.)

To resolve any of the Defendants' arguments would require this Court not only to second-guess the Eighth Circuit, which has already affirmed the FDIC's order against each of the Defendants, but also to violate the express wording of the preclusion clause of § 1818(i).[3] The framework provided by § 1818 for reviewing such orders as that imposed by the FDIC in the instant case simply does not allow a district court to change or set aside the order, except where the agency's action is "blatantly lawless." Abercrombie v. Office of Comptroller of Currency, 833 F.2d 672, 675 (7th Cir. 1987). As noted above, the Defendants have not claimed in the instant case that the FDIC's action was "blatantly lawless" and the Court concludes that such an argument is foreclosed by the Eighth Circuit's affirmance of

[3] The Defendants undeniably had the opportunity to raise all of these issues before the Eighth Circuit, because Wenzel was decided several months before their appeal of the FDIC order was submitted to the Eighth Circuit.

the order in FDIC v. Lindquist & Vennum, 103 F.3d 1409 (8th Cir. 1997). Accordingly, the Court concludes that it lacks jurisdiction to review the FDIC's order.

Conclusion

For the foregoing reasons, and based upon all of the files, records, and proceedings herein, **IT IS ORDERED** that:

(1) In case No. 98-2387/RHK/JMM, the Plaintiff's Motion for Summary Judgment (Doc. Nos. 27, 30) is **GRANTED** with regard to Defendants Rasmussen and Godbout-Bandal;

(2) Defendant Rasmussen shall pay Plaintiff the sum of $38,600.00 principal plus costs, post-judgment interest at the legal rate from the date of entry of this Memorandum Opinion and Order until paid in full;

(3) Defendant Godbout-Bandal shall pay Plaintiff the sum of $150,000.00 principal plus costs, post-judgment interest at the legal rate from the date of entry of this Memorandum Opinion and Order until paid in full; and

(4) The Court expressly determines that there is no just reason for delaying the entry of judgment against Defendants Rasmussen and Godbout-Bandal, and the Clerk of Court is expressly directed to enter judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

May 28, 1999

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs. Civil No. 98-2387(RHK/JMM)

Richard Donohoo,

Defendant. **ORDER**

Before the Court is the United States' Motion for Summary Judgment against Defendant Richard Donohoo.

On May 28, 1999, this Court filed a Memorandum Opinion and Order (Doc. No. 41) granting summary judgment in favor of the United States and against co-defendants Cheryl C. Godbout-Bandal and Bruce A. Rasmussen.

That earlier decision is now expressly reaffirmed in all respects, both factual and legal, and incorporated herein by reference. As appears from footnote 3, Defendant Richard Donohoo had filed a Suggestion of Bankruptcy which had the effect of staying the proceeding against him. He had, however, filed a Memorandum (Doc. No. 30) in response to the Government's Summary Judgment Motion. On August 19, 1999, the Bankruptcy Court in the Middle

District of Florida dismissed Donohoo's bankruptcy petition. See In re: Richard D. Donohoo, Debtor, Case No. 99-7644-9BC. The effect of the dismissal was to lift the automatic stay. The Government has now renewed its Motion for Summary Judgment with respect to Donohoo.

Defendant Donohoo has responded to the instant Motion suggesting that a delay would be appropriate in view of his pending appeal in the Florida Bankruptcy proceeding. He has also filed a Supplemental Memorandum.

Upon all the files, records, and proceedings herein, including this Court's May 28, 1999 Memorandum Opinion and Order (Doc. No. 41), which is incorporated herein by reference, **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment (Doc. No. 48) is **GRANTED**, and the Clerk of Court is directed to enter judgment against Defendant Richard Donohoo in the amount of $1,000,544.00 (One Million Five Hundred Forty-Four and No/100 Dollars). **LET JUDGMENT BE ENTERED ACCORDINGLY.**

December 20, 1999

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Civil No. 98-2388 (RHK/RLE)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	ORDER
	)	
RICHARD DONOHOO,	)	
Defendant.	)	

This matter comes before the Court, without hearing, pursuant to Rule 60(a), Fed.R.Civ.P.

Based upon the motion of the plaintiff United States and upon all the files, records and proceeding herein,

IT IS HEREBY ORDERED that the Judgment and Order, dated December 20, 1999, is amended to provide that:

(1) Plaintiff's motion for summary judgment (Doc. No. 48) is granted, and

(2) The Clerk of Court is directed to enter judgment against defendant Richard Donohoo in the amount of $1,000,544.00, plus post-judgment interest at the legal rate.

Dated: February 7, 2000

RICHARD H. KYLE
United States District Judge